No. 15,586

IN THE

United States Court of Appeals

For the Ninth Circuit

ELIZABETH G. WILLIAMS, Executrix, Estate of Preston L. Lykins, Deceased, *Appellant,*	
vs.	
UNITED STATES OF AMERICA, *Appellee.*	

On Appeal from the Judgment of the United States District Court for the Northern District of California.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

OPINION BELOW.

The memorandum and order for judgment together with the findings of fact and conclusions of law of the Court below (R. 91-97) have not yet been officially reported.

JURISDICTION.

This appeal involves federal income taxes. The taxes in dispute were paid as follows: $3,307 on March 4, 1952; $11,842.70 on June 13, 1952; and $1,248.24 on or about November 25, 1955. (R. 14.)

Claim for refund in the amount of $7,019.39 was filed on or about May 12, 1953 (R. 7-9, 14-15), and was rejected on or about December 28, 1955 (R. 10-11, 15.) Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and on July 23, 1956, the taxpayer brought an action in the District Court for recovery of the taxes paid. (R. 3-11.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on April 24, 1957. (R. 96-97.) Within sixty days and on May 7, 1957, notice of appeal was filed. (R. 97-98.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether the estate is entitled to a charitable deduction under Section 162(a) of the Internal Revenue Code of 1939 for asserted income payments to charity "pursuant to the terms of the will" of decedent where the decedent's will left all his property to his wife and she upon her death left some of her property to charities?

STATUTE INVOLVED.

Internal Revenue Code of 1939:

> Sec. 162 [as amended by Sec. 321 (b), Revenue Act of 1950, c. 994, 64 Stat. 906]. Net Income.
>
> The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an indivdual, except that—

(a) Subject to the provisions of subsection (g), there shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit; * * *

(26 U.S.C. 1952 ed., Sec. 162.)

STATEMENT.

This case was submitted upon the pleadings and a stipulation of facts. (R. 94.) The facts are as follows:

The appellant, Elizabeth G. Williams, hereafter referred to as the taxpayer, is the duly appointed executrix of the estate of Preston L. Lykins, deceased. (R. 14.) The decedent died testate on January 8, 1951, and was survvived by his wife, Mary T. Lykins. (R. 16.)

The decedent and his wife, on December 21, 1950, executed reciprocal wills. Decedent's will (R. 18-35) provided that his entire estate was to go to his wife should she survive him. (R. 19, 91.) In the event that she predeceased him, certain beneficiaries were

to receive specific bequests and devises (R. 20-24, 91) and the remainder of the property was to be held in trust for the benefit of various charitable organizations. (R. 24-27, 91.) The wife's will (R. 35-52) gave her entire estate to decedent (R. 37, 91) and in the event of his predeceasing her contained the same provisions for specific bequests and devises (R. 38-41, 91) and the same residual charitable trust. (R. 42-44, 91.)

On September 18, 1951, approximately nine months after the decedent's death, and while his estate was still in probate, the wife died. (R. 16, 91.)

The taxpayer filed a fiduciary income tax return for the period beginning with the date of decedent's death on January 8, 1951, and ending on December 31, 1951, and paid the tax there shown to be due together with the amount of an additional assessment for the same period. (R. 4, 12.) Subsequently, a claim for refund was filed in which it was contended that the taxpayer had erroneously included in the gross income of decedent's estate the income received by the estate after the date of the wife's death. Such income, it was contended, was exempt from taxation because it was set aside for charitable purposes. (R. 5, 7-9.)

In the fiduciary return filed the taxpayer reported as net income for 1951 the amount of $33,257.04. (R. 9.) Some of the payments made by the taxpayer during administration of the estate are as follows: Federal tax payments, $15,156.91 (R. 9); closing expenses allowed the taxpayer, $500 (R. 58); statutory compen-

sation to taxpayer as executrix, $4,972.40 (R. 58-59); statutory attorneys' fees, $4,972.40. (R. 59.) The amount of California inheritance taxes paid (R. 55) is not shown.

The District Court refused to allow the charitable deduction (R. 91-96) and entered judgment for the United States. (R. 96-97.) From this decision the taxpayer here appeals. (R. 97-98.)

SUMMARY OF ARGUMENT.

The decedent left all his property to his wife, and she, upon her death nine months later, left the residue of her estate to charities. Since the decedent left everything to his wife, he could not have left anything to charity and his estate is not entitled to the charitable deduction allowed by Section 162 of the Internal Revenue Code of 1939. That section sets forth three specific requirements which must be fulfilled before the deduction may be allowed: (1) The amount paid or set aside must come from the gross income of the estate; (2) the payment or setting aside must be pursuant to the terms of decedent's will creating the trust; and (3) the amount must be used exclusively for charitable, etc., purposes. These requirements are not met in the case at bar. Any payments that might have been made to charity were made pursuant to the will of the *wife,* and not the will of the decedent. The taxpayer's whole case relies upon factors completely extraneous to the will of the decedent: the death of his wife and her testamentary

bequest to charities. And these factors can be of no tax significance to the estate of the decedent so far as the Section 162(a) deduction is concerned in view of the precise requirement of that section that the amounts paid or set aside to charity must be pursuant to the terms of decedent's will. This decedent made no gifts to charity for the income of his estate.

Moreover, the claimed deduction could not be allowed even if taxpayer's primary argument were acceptable. The deduction under Section 162(a) is for income which is set aside for charity during the taxable year. Taxpayer has not shown that the decedent's estate had income in excess of administration expenses for 1951 and, accordingly, has not even shown that the wife's will operated during the taxable year to set aside income of the decedent's estate for charity.

ARGUMENT.

THE DECEDENT'S ESTATE IS NOT ENTITLED TO A CHARITABLE DEDUCTION UNDER SECTION 162(a) OF THE INTERNAL REVENUE CODE OF 1939.

The decedent herein died on January 8, 1951, and his death was followed about nine months later by the death of his wife. (R. 16.) Since the wife survived decedent, his estate was left in accordance with the provisions of Article V of his will. This article provides (R. 19) that:

> I give, devise and bequeath all of my property and estate, both real and personal, and wherever situated, to my said wife, Mary T. Lykins, if she shall survive me.

In compliance with the terms of decedent's will, the taxpayer, his executrix, distributed his entire net estate to the executrix of the estate of his wife. (R. 57.) The provisions which the decedent had made for a charitable trust of the residue of his estate in the event that his wife predeceased him never became operative. Because the decedent left everything to his wife he could not have left anything to charity. His estate, consequently, is not entitled to the charitable deduction allowed by Section 162, *supra,* which provides in pertinent part as follows:

> Sec. 162. Net Income.
>
> The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—
>
> (a) Subject to the provisions of subsection (g), there shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes. * * *

Three specific requirements which must be fulfilled before the charitable deduction may be allowed are readily apparent from the section. First, the amount paid or set aside must come from the gross income of the estate; second, the payment or setting aside must be pursuant to the terms of decedent's will creat-

ing the trust; and third, the amount must be used exclusively for charitable, etc., purposes. Not a single one of these requirements is met in the case at bar. The decedent left his entire estate, income and corpus, to his wife. She was given a complete interest in such estate, and no interest at all from either the corpus or the income of the estate was paid or set aside for charitable purposes.

Taxpayer's sole argument in this case is based upon the facts that the will of the wife (not the decedent) left the residue of *her* estate to charities and that the decedent's estate made up part of the wife's estate. Taxpayer thus completely ignores the express requirement of the statute that the gift of the income to charities be made "pursuant to the terms of the will or deed creating the trust." The decedent made no gift at all to charities, he left all his property to his wife. The fact that she later died and left some of *her* property to charities is manifestly of no tax significance to the estate of the decedent. The taxpayer's whole case here relies upon factors completely extraneous to the will of the decedent.

The weakness of taxpayer's case is apparent when the situation is viewed as if the wife had not died. In such an instance, all of the income and corpus would go to the wife, just as here it falls into the wife's estate, and there would be no question at all as to the taxability of decedent's estate for the income received during the year in question. Suppose, for the purposes of illustration, that the wife made an *inter vivos* assignment to charities for her interest in the income

of decedent's estate. The only tax consequence that would result from such an assignment would concern the question of whether the wife herself was taxable on the income. This assignment, completely outside and extraneous to the will of the decedent, would have no effect whatsoever upon the tax affairs of the decedent's estate. The taxpayer, in setting forth this same situation, obliquely states (Br. 14) that "the income of Preston's estate subsequent to such assignment would then be permanently set aside for the charitable assignee." (Citations omitted.) This statement is probably true, but it certainly is not dispositive of the issue before this Court. The income is set aside permanently for the charitable assignee, but it is set aside by the wife, not by the decedent, and it has no effect upon the taxability of decedent's estate. None of these cases cited by taxpayer (*Commissioner v. Blair,* 300 U.S. 5; *Commissioner v. Clark,* 202 F. 2d 94 (C.A. 7th); *United States v. Pierce,* 137 F. 2d 428 (C.A. 8th); *Helvering v. Achelis,* 112 F. 2d 929 (C.A. 2d)) does more than consider whether or not the interest assigned is includible within the gross income of the assignor of the interest. In none of these cases was the taxability of the estate or trust considered, and none is dispositive of the issue here under consideration.

That the payment to charity must be made pursuant to the will of the decedent before the amounts may be deducted under Section 162(a) is clear from the precise terms of the section. The Supreme Court, in *Old Colony Co. v. Commissioner,* 301 U.S. 379, 383, stated that:

> "Pursuant to" is defined as "acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according."
>
> The words of the statute are plain and should be accorded their usual signifiance in the absence of some dominant reason to the contrary.

Fitting the present situation within the above definition, the only thing done "pursuant to the terms of the will" of the decedent was to distribute his assets to his wife. His will did not direct that any of his property or the income therefrom be given to charity.

The Third Circuit, in *Falk v. Commissioner,* 189 F. 2d 806, certiorari denied, 342 U.S. 861, decided that certain payments of trust income which were actually made to charities were includible in the gross income of the donor's son where the trust instrument provided that out of the trust income a certain sum was to be paid to the daughter of the donor, a portion to such charities as the son might designate, and the balance to the son. Because the son was under no obligation at all to designate payment to any charities, the entire income actually designated was held includible in his gross income, since none of the payments were made pursuant to the trust instrument. The case at bar, where the will of the decedent makes no mention at all of disposing of his property to charity should his wife survive him, manifestly presents an even stronger case for holding that no payments were made to charity pursuant to the will.

The taxpayer is unable to cite any case where the charitable deduction has been allowed an estate merely because the benecifiary of the estate makes a gift to charity. In all of the cases cited, there has been some express provision for charity in the will or trust instrument itself, and the Courts have looked to the terms of the will or trust instrument in order to determine deductibility. One example of such a situation is found in *Arthur Jordan Foundation v. Commissioner*, 210 F. 2d 885 (C.A. 7th). In that case the trust instrument provided that all earnings were to go to charities. The question of deductibility of income received arose because of a provision in the trust instrument which provided for an accumulation of some of the net earnings. An indication of the all-encompassing importance of the trust instrument itself is contained in the following statement of the Court (pp. 887-888):

> Under this provision [Section 162(a)] the trust may itself engage in functional charitable activities and deduct for such expenditures. * * * Whether or not claimed deductions will be allowed must be determined by reference to the terms of the instrument creating the trust. The test is the purpose for which the funds are to be used and those purposes must be ascertained from the directions given by the settlor.

And see *Merchants Bank v. Commissioner,* 320 U.S. 256; *Commissioner v. F. G. Bonfils Trust*, 115 F. 2d 788, 792 (C.A. 10th); *Bowers v. Slocum,* 20 F. 2d 350 (C.A. 2d). Reference to the will in the instant case makes it clear that all the funds are to be used by

the decedent's wife. She was not a charity and the funds paid to her estate are not deductible.

Moreover, the claimed deduction would not be allowable even if taxpayer's primary argument were acceptable. The income for which a deduction is allowed under Section 162(a) is only that which is permanently set aside for charity "during the taxable year." Here the taxable year is January 8, 1951 (the date of the decedent's death), to December 31, 1951, and taxpayer is claiming a deduction for income of the estate for the period from September 18, 1951 (the date of the wife's death), to December 31, 1951, on the theory that such income became payable to the estate of the wife and was set aside for charity under the wife's will. But taxpayer has not shown that the decedent's estate had income for that period in excess of administration expenses or that any such income became distributable to the wife's estate and was, under the wife's will, set aside for charity in 1951. The facts show that taxpayer expended on behalf of the estate substantial sums for taxes, debts, and expenses of administration. There is no indication that there was anything left of the income of the estate, much less income of the taxable year, to be distributed to the wife's estate and set aside for charitable purposes. See *Bank of America Nat. T. & Sav. Ass'n v. Commissioner,* 126 F. 2d 48 (C.A. 9th); *Boston Safe Deposit & T. Co. v. Commissioner,* 66 F. 2d 179 (C.A. 1st). A payment to charity of the corpus of the estate is not deductible (*Frank v. Commissioner,* 145 F. 2d 413 (C.A. 3d); *Wellman v. Welch,* 99 F. 2d 75 (C.A. 1st)) and no deduction can be allowed for in-

come whose use or destination is uncertain (*John Danz Charitable Tr. v. Commissioner*, 231 F. 2d 673, certiorari denied, 352 U.S. 828, rehearing denied, 353 U.S. 951; *Merchants Bank v. Commissioner, supra; Maloney v. Glover,* 171 F. 2d 870 (C.A. 9th), certiorari denied, 337 U.S. 917). In this connection it should also be noted that the wife's will contained a provision (see R. 50-51) to the effect that it was her wish and intention that the right of the charitable beneficiaries to receive income "shall in no event accrue * * * until after the date of distribution to the trustee of the property constituting the trust estate [1953, after the taxable year], and not from the date of my death."

CONCLUSION.

The decision of the District Court in favor of the United States was correct and should be affirmed.

Respectfully submitted,

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